



Billing Code: 8025-01

## SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245-AG59

Advisory Small Business Size Decisions

AGENCY: Small Business Administration.

ACTION: Proposed rule.

SUMMARY: This rule proposes to implement provisions of the National Defense Authorization Act of 2013 (NDAA) pertaining to small business size. Specifically, the rule proposes to amend the Small Business Administration's (SBA or Agency) program regulations to implement statutory provisions establishing a safe harbor from fraud penalties for individuals or firms that misrepresent business concerns as being small for purposes of Federal procurement opportunities if they acted in good faith reliance upon small business status advisory opinions received from Small Business Development Centers (SBDCs) or Procurement Technical Assistance Centers (PTACs). The rule also proposes to amend SBA's regulations to establish the criteria small business status advisory opinions must meet in order to be deemed adequate and specify the review process for such opinions. Finally, the proposed rule would amend SBA's regulations to update the circumstances under which SBA may initiate a formal size determination.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN: 3245-AG59, [Docket Number: SBA-2014-0007] by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail or Hand Delivery/Courier: Dean R. Koppel, Assistant Director, Office of Policy and Research, Office of Government Contracting , U.S. Small Business Administration, 409 3<sup>rd</sup> Street, S.W., 8th floor, Washington, D.C. 20416.

All comments will be posted on [www.regulations.gov](http://www.regulations.gov). If you wish to submit confidential business information (CBI) as defined in the User Notice at [www.regulations.gov](http://www.regulations.gov), please submit the information to Dean R. Koppel, Assistant Director, Office of Policy and Research, Office of Government Contracting , U.S. Small Business Administration, 409 3<sup>rd</sup> Street, S.W., 8th floor, Washington, D.C. 20416 , or send an email to [dean.koppel@sba.gov](mailto:dean.koppel@sba.gov). Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will make the information public.

FOR FURTHER INFORMATION CONTACT: Dean R. Koppel, Assistant Director, Office of Policy and Research, Office of Government Contracting , U.S. Small Business Administration, 409 3<sup>rd</sup> Street, S.W., 8th floor, Washington, D.C. 20416; (202) 205-7322; [dean.koppel@sba.gov](mailto:dean.koppel@sba.gov).

SUPPLEMENTARY INFORMATION: On January 2, 2013, Congress amended the Small Business Act to provide that the penalties created under 15 U.S.C. 645(a) for misrepresentation of a firm as a small business concern do not apply to individuals or firms that act in good faith reliance upon small business status advisory opinions they receive from SBDCs or PTACs. Additionally, the Small Business Act was amended to

give responsibility for reviewing, accepting, or rejecting these small business status advisory opinions to SBA's Office of General Counsel. Finally, the Small Business Act was further amended to require that SBA promulgate regulations to implement this safe harbor provision no later than 270 days after the date of passage of the statutory amendment.

This rule proposes to make a number of changes to SBA's size regulations. Some of the changes involve technical issues. Other changes are more substantive and result from SBA's experience in implementing the current regulations.

The following three specific changes are being proposed to SBA's size regulations.

#### Exemption from Penalties for Misrepresentation of Size Status

Section 1681 of the NDAA requires that SBA create an exemption to the penalties imposed under 15 U.S.C. 645(a) for misrepresentation of small business status in cases where the person or concern making the misrepresentation acted in good faith reliance on a written advisory opinion from an SBDC or PTAC. SBA's first proposed change is to implement the statutory requirement at section 1681 of the NDAA by changing SBA's small business size regulations.

#### Small Business Status Advisory Opinions

The second proposed change to the small business size rules is to define what constitutes an adequate small business status advisory opinion.

#### Circumstances in Which SBA May Request a Formal Size Determination

The third proposed change to the size rules pertains to the circumstances under which SBA officials may request formal size determinations. Current § 121.1001(b)(9) references the Central Contractor Registry, a procurement related federal government

database that has been replaced by the System for Award Management. The proposed change clarifies the stated purpose of this provision and updates it to refer to the System for Award Management.

Compliance with Executive Orders 12866, 12988, 13175, and 13132, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Paperwork Reduction Act (44 U.S.C., Ch. 35).

#### Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule does not constitute a significant regulatory action under Executive Order 12866, and as a result a regulatory impact analysis is not required.

#### Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

#### Executive Order 13132

For purposes of Executive Order 13132, SBA has determined that this proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purpose of Executive Order 13132, Federalism, SBA determines that this proposed rule has no federalism implications warranting preparation of federal assessment.

#### Executive Order 13175

For purposes of Executive Order 12175, SBA has determined that this proposed rule will not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Therefore, for the purpose of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, SBA determines that this proposed rule does not require consultations with tribal officials or warrant the publication of a Tribal Summary Impact Statement.

#### Executive Order 13563

As part of its ongoing efforts to engage stakeholders in the development of its regulations, SBA consulted with representatives from both industry and the general public to review the intent of the proposed rule and various components related to it. No concerns were raised during those calls and no comments were raised that needed to be addressed in this proposed rule.

#### Initial Regulatory Flexibility Analysis, 5 U.S.C. 601-612

This rule, if finalized, may have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612. In accordance with 5 U.S.C. 603(b), SBA sets forth an initial regulatory flexibility analysis (IRFA) of this proposed rule addressing the following topics: (1) the legal basis, need for, and objective of the rule; (2) a description and estimate of the number of small entities to which the rule will apply; (3) the projected reporting, record keeping, and other compliance requirements of the rule; (4) the relevant Federal rules which may duplicate, overlap or conflict with the rule; and (5) any significant alternatives that would allow the

Agency to accomplish its regulatory objectives while minimizing the impact on small entities.

1. What is the legal basis, need for, and objective of the rule? Pursuant to section 1681 of Public Law 112-239, SBA is statutorily required to publish a regulation granting an exemption from the misrepresentation penalties imposed under 15 U.S.C. 645(a) in cases where a party's erroneous claim to small business status stems from its good faith reliance upon an advisory opinion issued by an SBDC or PTAC. SBA is also obligated under section 1681 to define via regulation what constitutes an adequate advisory opinion and to review and accept or reject all advisory opinions issued by SBDCs and PTACs. In addition to giving effect to these statutory mandates, the proposed rule also establishes the procedures and timeline by which SBA will review advisory opinions.

2. What is SBA's description and estimate of the number of small entities to which the rule will apply? Because SBA's programs do not apply to small governmental jurisdictions or small organizations, only small businesses will be affected by this proposed rule. Additionally, the proposed rule will not apply to all small businesses generally, but only to those firms that represent themselves as being small for purposes of federal procurement opportunities.

The safe harbor provision of the proposed rule will only affect those firms that incorrectly claim status as small business concerns after obtaining small business status advisory opinions from SBDCs or PTACs. In Fiscal Year 2010, SBA determined that approximately 150 firms that had represented themselves as being small for purposes of federal procurement opportunities were not small. Most of these cases did not involve fraud, but instead were the result of errors or misunderstandings of the size regulations.

To date, SBA is unaware of any firms being penalized under 15 U.S.C. 645(a) for fraudulently misrepresenting themselves as small business concerns. Therefore, SBA anticipates that the safe harbor provision of the proposed rule will impact very few concerns.

With regard to the small business status advisory opinion provision of the proposed rule, SBA notes that neither SBDCs nor PTACs are required to provide such opinions under the language of the statute. It is currently unknown how many SBDCs and PTACs will elect to provide such services, particularly given that no additional funding will be awarded to them to cover the cost of these services. Moreover, it is unclear how much demand there will be for such services from those SBDCs and PTACs that offer them. While it is thus impossible to gauge the number of small businesses that will obtain these services, SBA anticipates that very few concerns will be affected by the small business status advisory opinion provision of the proposed rule.

3. What are the projected reporting, record keeping, and other compliance requirements of the rule and an estimate of the classes of small entities which will be subject to the requirements? There would be no additional reporting or recordkeeping requirements imposed by the rule, but there would be certain minor compliance requirements.

Businesses that believe themselves to be small and that wish to receive advisory opinions to that effect from SBDCs or PTACs would be required to provide information documenting the basis for that belief to SBDCs or PTACs and attest to its accuracy.

4. What are the relevant Federal rules which may duplicate, overlap or conflict with the rule? The Federal Acquisition Regulation (FAR) defers to and incorporates the substance of the provisions set forth in SBA's regulations for issues pertaining to business size. To

the extent the FAR is inconsistent with size rules implemented by SBA, the FAR would need to be changed to be consistent.

5. Are there any significant alternatives that would allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities? SBA has considered a number of alternatives to the proposed rule. One alternative SBA has considered would have permitted firms to simply self-certify to SBDCs or PTACs that they are small. Another alternative SBA considered would have had the General Counsel review the SBDC or PTAC advisory opinions rather than the Associate General Counsel, Office of Procurement Law. SBA has not proposed the first alternative because it would render any advisory opinion pro forma and would not provide the Agency with any basis for accepting or rejecting the opinion. With regard to the second alternative, SBA did not propose it given the substantial time demands already placed upon the General Counsel. SBA believes that delegating this responsibility to the Associate General Counsel, Office of Procurement Law would permit the Agency to provide a quicker turnaround time for reviewing advisory opinions and would take advantage of the established subject matter expertise of that official. SBA is very interested in comments from the public on these issues.

#### Paperwork Reduction Act, 44 U.S.C. Ch. 35

SBA has determined that this proposed rule imposes no additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

#### List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Reporting and recordkeeping requirements, Small businesses.



For the reasons set forth in the preamble, SBA proposes to amend 13 CFR part 121 as follows:

PART 121 – SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for part 121 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644 and 662(5); and Pub. L. 105-135, sec. 401 et seq., 111 Stat. 2592.

2. Amend §121.108 by revising the section heading and adding paragraph (e)(4) to read as follows:

§ 121.108 What are the penalties for misrepresentation of size status?

\* \* \* \* \*

(e) \* \* \*

(4) Limitation of Liability. An individual or business concern will not be subject to the penalties imposed under 15 U.S.C. 645(a) where it acted in good faith reliance on a small business status advisory opinion accepted by SBA under § 121.109.

§121.109 [Redesignated as §121.110]

3. Redesignate § 121.109 as § 121.110.

4. Add new § 121.109 to read as follows:

§ 121.109 What is a small business status advisory opinion?

(a) Defined. A small business status advisory opinion is a written opinion issued by either a Small Business Development Center (SBDC) operating under part 130 of this chapter or a Procurement Technical Assistance Center (PTAC) operating under 10 U.S.C. Chapter 142 which concludes that a firm is entitled to represent itself as a small business concern for purposes of federal government procurement opportunities.

(b) Submission. An SBDC or PTAC must submit a copy of each small business status advisory opinion it issues to the following Agency official for review: Associate General Counsel, Office of Procurement Law, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416 or by fax to (202) 205-6390 marked Attn: Small Business Status Advisory Opinion. A small business status advisory opinion must:

(1) Include the name, address, Employer Identification Number or Dun & Bradstreet Number, and one or more principals of the covered concern.

(2) Identify the individual NAICS code(s) and accompanying size standard(s) to which the advisory opinion applies.

(3) A determination that the covered concern does not exceed the size standard(s) dated and signed by a counselor or similarly qualified employee of an SBDC or PTAC.

(4) Include, as an attachment, copies of the evidence provided by the covered concern to the SBDC or PTAC clearly documenting its annual receipts and/or number of employees as those terms are defined by §§ 121.104 and 121.106.

(5) Include, as an attachment, a written statement signed by at least one principal of the concern affirming that all the information provided to the SBDC or PTAC for the purpose of obtaining the small business status advisory opinion is, to the best of his/her knowledge, true, accurate, and complete.

(c) Review. Unless a referral is made under paragraph (e) of this section, SBA will decide within 10 business days of receiving a small business status advisory opinion to accept or reject it based on its consistency with this part. SBA will provide written notification of that decision to the SBDC or PTAC that issued the small business status advisory opinion as well as to the covered concern.

(d) Reliance. A concern that receives a small business status advisory opinion holding that it does not exceed the applicable size standard(s) may rely upon that determination for purposes of responding to federal procurement opportunities from the date it is issued unless and until that advisory opinion is rejected by SBA in accordance with paragraph (c) of this section or § 121.1009.

(e) Referral for Size Determination. Nothing in this section precludes SBA from requesting a formal size determination for a concern that is the subject of a small business status advisory opinion pursuant to § 121.1001(b)(9).

5. Amend § 121.1001 by revising paragraph (b)(9) to read as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

\* \* \* \* \*

(b) \* \* \*

(9) For other purposes related to protecting the integrity of the Federal procurement process, including validating that firms listed in the System for Award Management database are small and firms can rely upon advisory size status opinions, the Government Contracting Area Director or the Director, Office of Government Contracting may initiate a formal size determination when sufficient information exists that calls into question a firm's small business status. The current date will be used to

determine size, and SBA will initiate the process to remove from the database the small business designation of any firm found to be other than small.

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Maria Contreras-Sweet,  
Administrator.

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